Humana of West Virginia, Inc. d/b/a Greenbrier Valley Hospital *and* United Steelworkers of America, AFL-CIO-CLC. Case 9-CA-15150

December 16, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND ZIMMERMAN

On June 26, 1981, Administrative Law Judge Marvin Roth issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge only to the extent consistent herewith, and to amend his recommended Order.

The Administrative Law Judge concluded that Respondent violated Section 8(a)(1) of the Act by providing employees improved sick pay benefits, granting retroactive wage increases to three employees, and by refraining from laying off employees pursuant to its staffing policy. He also found that Respondent impliedly directed head nurse Sarah Morgan to engage in unfair labor practices, and subsequently discharged Morgan (a) for allegedly refusing to participate in unfair labor practice conduct, and/or (b) because charges were filed on her behalf with the Board. Respondent in its exceptions contends, *inter alia*, that the Administrative Law Judge's findings are not supported by a preponderance of the evidence and that his conclusions are erroneous. We find merit in Respondent's contentions.

Humana Corporation either directly or through subsidiary firms operates some 197 hospitals, with 19 hospitals, including the facility involved here, encompassed in its central region. In a memorandum dated April 21, 1980,[1] Corporate Vice President Phillips notified all regional vice presidents, executive directors and administrative, and regional personnel managers that the management committee had approved a major revision in the corporation's sick pay policy, to provide that (a) after an employee's first appraisal period (3 months), sick pay benefits would begin on the second day of illness, and, after 6 months, on the first day of illness; and (b) upon completion of 1 year of service, employees would be permitted to convert one-half of their unused sick days, up to 40 hours, to approved time off or to cash, with any remaining unused days to be used to build toward a maximum of 130 days. The letter stressed that the former feature "must be implemented" by June 1, and the latter by September 1, and that these were final dates which did not preclude earlier implementation. In a memo dated April 23, Central Region Personnel Manager Weliver notified all central region administrators and personnel directors of the decision to improve Humana's standard sick pay plan, stating that the first phase would be effective on May 1, in the central region, with the second phase effective on an employee's anniversary date after September 1. Weliver's memo included an admonition that these improvements be communicated to employees through a personal memo or payroll attachment as soon as possible. Greenbrier Executive Director Livingston, in an April 29 memo to all employees of that facility, informed them of the revisions that had been made in Humana's standard sick pay plan after several months' review.

It is evident that the decisionmaking process was fully under way well before the onset of any organizing activity at this facility (indeed, Vice President of Employee Relations Rogers' memo to Phillips outlining costs of the proposal had itself preceded the organizational campaign). It is also clear that this benefit was provided for employees nationwide, and that Respondent could not very well implement the first phase or announce the second for the 18 other hospitals in the central region while withholding it from employees of this facility based on the advent of organizational activity. Thus, to affirm the Administrative Law Judge's findings, in the particular circumstances of this case, would in essence require us to conclude that Respondent's implementation of the first phase of the change for at least the 19 hospitals in the central region, and the announcement of the second portion for employees nationwide, was an action affirmatively undertaken in order to counteract organizational activity at this particular facility. In our view, however, the record demonstrates that the announcement to employees at the Greenbrier location was incidental to the announcement and implementation of a corporate decision applicable nationwide. Accordingly, we shall dismiss this allegation.

The Administrative Law Judge concluded that wage increases granted to employees Tallman, Hizer, and Legg were given in order to discourage employee support for the Union. The basis for all three increases was the promotion of these employees to charge nurse, approved by then Director of Nursing Services Tuckwiller on January 8, with

[1] All dates herein are 1980 unless otherwise designated.

the increases to be effective as of the dates set out on the personnel action forms, which were introduced in evidence. Tuckwiller could not recall why Hizer's increase had not been put into effect at that time, and it is not contradicted that the authorizations were found in Tuckwiller's desk after she went on maternity leave on April 11, and given to Acting Director Halstead. Hizer testified that Halstead summoned her to the nursing office, showed her the personnel action form found in Tuckwiller's drawer, and told her she would receive the increase as of the effective date on the form. The form shows approval by Halstead and Hunter on Monday, April 14, and by Livingston on April 16. The Administrative Law Judge in finding a violation seems to have relied at least in part on his assumption that the Company in the past had dragged its feet on pay raises and did not normally make increases retroactive, which he apparently inferred, in turn, from his summary of the testimony of employee Winston, who said she encountered a lengthy delay before receiving a merit increase. In our view the record does not warrant those assumptions. Winston testified that, after an evaluation in January 1979, she felt she had not received enough of an increase, and thereafter discussed the matter with her supervisor, Morgan, as well as with Director of Nursing Services Tuckwiller and Personnel Director Hunter. She did not obtain more money on the basis that she claimed. Although she did receive an increase, it was "because they changed a new policy or something, so that you were supposed to get five cents more on the years of experience," and "it had nothing to do with because I went up there and talked to them." Further, the record does not indicate whether Winston received any money retroactively, nor whether the policy change would have suggested any such action. In sum, while the timing of the increase granted may appear somewhat suspicious, that is not sufficient. We note that, in addition to the two individuals named by Hizer in her testimony as having received increases (namely, Tallman and herself), an adjustment was also given to Legg, whose name does not appear as a union proponent. Nor does the record suggest that Tuckwiller's testimony that the raises should have been granted when she signed the forms was contrived, or that the raises would not have been granted earlier had the papers not apparently been mislaid in Tuckwiller's desk. Accordingly, we shall dismiss this allegation of the complaint.

The Administrative Law Judge's finding a violation regarding an alleged benefit change in staffing procedure appears premised on his assumptions that employees "would normally be expected to take" vacations in December or during the summer, and that it was "unlikely" that the patient-to-staff ratio (PMR) during April and May would be high in comparison to the winter months, "with their accompanying illnesses and accidents precipitated by severe weather." In addressing this issue, we note first our agreement with the Administrative Law Judge's observation that the allegation "was marked by a paucity of evidence." Hizer's testimony in conjunction with the PMR policy shows only that, after the petition was filed, she herself was not aware of any employees being asked to take a day off without pay while she (Hizer) was present. Rogers' testimony, and that of the General Counsel's witness Erwin, that the census was "up high" during the preelection campaign was not contradicted. In these circumstances, we do not deem the evidence sufficient to demonstrate by a preponderance that a violation occurred with respect to staffing policy, or to support the inference that Respondent intentionally refrained from laying off employees. We shall therefore dismiss the allegation.

The complaint alleges in substance that Respondent interrogated and threatened Sarah Morgan, an employee, and subsequently discharged her for her union activities, and/or because she filed a charge. Respondent argues that, although Morgan was in fact discharged for engaging in union activity, Respondent's actions did not violate the Act because Morgan was a statutory supervisor. A substantial portion of the record concerns Morgan's status, and the Administrative Law Judge found Morgan to be a supervisor, a finding to which no exception is taken. He further found her discharge violative of the Act.

Recently, in *Parker-Robb Chevrolet, Inc.*,[2] the Board rearticulated certain circumstances in which the discharge of a supervisor may violate the Act, including, e.g., giving testimony adverse to an employer's interest, either at an NLRB proceeding, or during the processing of an employee's grievance under a collective-bargaining agreement; or refusing to commit unfair labor practices. In such circumstances, the protection afforded supervisors stems not from any statutory protection afforded supervisors, but rather from the need to vindicate the exercise by *statutory employees* of *their* Section 7 rights. But the Board also concluded in *Parker-Robb* that the "integral part" or "pattern of conduct" line of cases, i.e., those where violations were found as to termination of supervisors for their own union or concerted activity, should be overruled. Thus, whether supervisors engage in

[2] 262 NLRB 402 (1982).

union activity by themselves, or when allied with rank-and-file employees, their discharge for that activity is not unlawful. Accordingly, the Board overruled *DRW Corporation*,[3] and similar "integral part" or "pattern of conduct" cases, to the extent they were inconsistent with *Parker-Robb*, (*Id.* at 402–403).

In the instant case, the Administrative Law Judge concluded that Morgan was impliedly directed to commit unfair labor practices by Respondent, and was subsequently discharged because she declined to do so, and/or because a charge was filed on her behalf. Respondent in its exceptions contends, *inter alia*, that the Administrative Law Judge erred in imputing those reasons as the motivating cause for Morgan's discharge. While we conclude that such reasons would fall within the circumstances discussed above under which discharge of a supervisor may violate the Act, we find merit in certain of Respondent's exceptions. Hence, contrary to the Administrative Law Judge, we find no violation attaches to Morgan's suspension or discharge, for the following reasons. Initially, we note that, in declining to adopt the Administrative Law Judge's conclusions regarding Morgan's termination, our disagreement stems not from disapproval of his credibility findings, but rather as to inferences drawn from the record concerning the reasons which motivated Respondent in discharging Morgan.

Paragraph 5 of the complaint alleges, *inter alia*, that Respondent through Tuckwiller, Hunter, and Livingston violated Section 8(a)(1) of the Act by interrogating Morgan and threatening her with suspension, premised on the General Counsel's position that Morgan was an employee within the meaning of the Act. Although the General Counsel did not allege that Morgan, as a supervisor, was directed to commit unfair labor practices, the Administrative Law Judge so found.[4] We do not agree. The Administrative Law Judge appears to have relied on an assessment of Tuckwiller's testimony concerning what Hunter said to Morgan in concluding that Hunter impliedly directed Morgan to interrogate employees concerning union activity. Tuckwiller's testimony revealed that Hunter was concerned about reports that Morgan was herself circulating a "paper" or petition among employees. Morgan denied having any knowledge of it.[5] At that point, according to Tuckwiller, Hunter told Morgan of the Company's policies regarding supervisors' responsibilities "in this type of situation" and, if they had any knowledge of action of this type, "to do our part" and bring any problems to management's attention. Tuckwiller immediately thereafter testified that she was "not using exact words of the conversation, because I can't recall the exact words," and that Hunter had referred to "leadership roles" of management employees and supervisors. It is clear that Hunter's, Tuckwiller's, and Livingston's discussion with Morgan would have violated Section 8(a)(1) *if* Morgan had been a statutory employee as alleged in the complaint. But we do not view the evidence as warranting a finding that Respondent either specifically or impliedly directed Morgan, as a supervisor, to commit unfair labor practices. While Morgan was told she could be suspended for circulating a petition, she apparently understood this to apply to her personally, as indicated by her questioning what would happen to her if she did it on her own time.

While speaking at a meeting of head nurses and department heads on March 28, a company official indicated that abetting the Union's organizing campaign was not compatible with their supervisory obligations. Morgan thereupon got up and walked out. Shortly thereafter, she was summoned to meet with Rogers, who said he knew she was working for the Union, but that as a supervisor she was required to support the hospital. He also told her she would have to pass out literature, which he would give her, and talk to employees; and that Rogers would tell her what to say. Morgan replied she did not think she could do that. Rogers said he would give her time to think about it, and he would talk to her later in the day. That afternoon, Morgan met with Rogers and Hunter. Rogers asked Morgan if she had thought about their conversation, and if she could pass out literature and talk to employees. Morgan again replied that she could not do that. Rogers told her she would be suspended for 7 days; if she changed her mind during that time and felt she could return to work, she should contact Hunter. After Morgan had returned to her station to change, she called Hunter to ask if she could have the suspension in writing, and he told

[3] *DRW Corporation d/b/a Brothers Three Cabinets*, 248 NLRB 828 (1980).

[4] As the Administrative Law Judge correctly noted, the General Counsel did not urge that Morgan was asked to commit unfair labor practices or that this was a ground for her suspension and termination. He concluded that the allegations of the complaint were sufficiently broad to encompass that ground. While we note that the General Counsel's entire litigation herein clearly appears bottomed on the contention that Morgan was an employee under the Act, we find it unnecessary to pass on this issue for, assuming *arguendo* that the matter was alleged and/or litigated, we find, as discussed *infra*, that Morgan was discharged for other reasons.

[5] Morgan testified at the hearing that she had consistently denied having or knowing about any petition and—responding to the Administrative Law Judge—contended that her answers were true. Later in the hearing, she explained that she had had a "mental reservation" that the term "petition" did not really include the union authorization cards which she had in fact been passing out in the Intensive Care Unit (ICU), as well as in the housekeeping and purchasing departments, and to orderlies who worked throughout the hospital.

her to come back to the office. When she got there, Morgan asked Hunter if she was "being suspended for union activities," "and he said yes." Morgan asked what policy that was, and was told it was failure to comply with hospital policies; Morgan said she did not know of any such policies, "and he showed me in the manager's manual. It was 10.3.9 or something like that." After she left, Morgan called and talked to union representatives. On April 2, the Union filed a charge alleging that Morgan was suspended "with intent to discharge" because she refused, *inter alia*, to hand out literature against organization.

Morgan, still on suspension on April 2, called Hunter and the next morning met with him and Rogers. The record includes a stipulated transcript of a tape recording that Morgan made of that meeting without the others' knowledge. When asked what factors Morgan had considered that may have helped her change her mind, she replied that she had talked to several other people who told her she could take a neutral stand, that she did not have to support the hospital. Rogers indicated that Respondent had heard that she had approached the Union and they were going to file charges, which Respondent welcomed because it would "frankly solidify" Respondent's position that the head nurses were supervisors. Rogers asked Morgan to look at a contract from another regional hospital to see that supervisors were excluded. Morgan asserted that she was for collective bargaining at the hospital, "since I've been head nurse and even before that." Rogers said Morgan, by her concept, was telling the people on the floor that the Union was going to get them all kinds of things, and had taken the Union's side or position with any number of employees as to how she felt about collective bargaining. He continued, "[Y]ou tell me that the way changes are going to come about is because of the Union." Following further discussion of collective bargaining, Hunter said, "[Y]ou do not think without collective bargaining we were getting some action for you back there in ICU, and Morgan responded 'no I didn't.'" Rogers accused Morgan of having a petition or paper that employees were signing, which Morgan denied.[6]

Thereafter, Rogers said Morgan had apparently still not been able to wrestle with the issue; that he wanted to get the election cleaned up and had no intention of getting a demand bargaining order, or changing things during the campaign. According to him, there were two issues that he and Morgan had to get over, and he wanted her, without any "non answers," to define in depth what her neutral position would be. Morgan replied she would do what they wanted while she was there at the hospital as long as it was legal, but felt they needed something else. Rogers expressed the view that Morgan on her own time would let her true feelings be known, because she felt that collective bargaining was what they needed, that that was her problem. Hunter asked if she would be seeing the Union's people after hours; Rogers stated that she had already said that she was going to file a charge, that they would be pleased to have a field examiner take a deposition, suggesting that no complaint would issue. Rogers then stated, "If we bring you back, you are prohibited from going to union meetings." Morgan responded, "No, I can still go to union meetings." Rogers said, "No, you cannot. You are not going to go to the union meetings. I'm sorry." Hunter said, "It's a violation of the law." Rogers said he would file charges. Hunter said she would be jeopardizing management at the hospital; that she would be perceived "as a management person who is spying on them." Morgan wanted to know why another head nurse was doing something (inaudible on the tape). Rogers replied it was none of her business; that the other nurse had come to grips with the whole issue very easily, and he was not going to get into it any further than that. Morgan said, "Okay."

In support of finding her discharge unlawful, the Administrative Law Judge concluded that Morgan's "Okay," above, "indicated that she would acquiesce in the company's position." We disagree. First, while we concur with the Administrative Law Judge that Rogers did not indicate he would accept neutrality from Morgan, we view that finding itself to be inconsistent with a conclusion that Morgan agreed to such a request. Further, the record shows that Morgan consistently maintained her open prounion advocacy. Thus, she reiterated her view that collective bargaining was desirable and even necessary for the hospital, and reasserted her intention to continue attending union meetings.[7] We see nothing in the transcript suggesting that Morgan intimated a retreat from either position. Additionally, the transcript shows Morgan's "Okay" was in any event a response to Rogers' declining to discuss with her the details of another matter which he considered not to be Morgan's business, rather than an expression of her "acquiescence" in the Company's position.

As noted above, the General Counsel did not allege any attempt by Respondent during any of these conversations to induce Morgan to engage in any illegal activities. Rather, counsel for the Gen-

[6] See fn. 5, *supra.*

[7] While the Administrative Law Judge did not credit Rogers' testimony that Morgan insisted on a right to go to union meetings, we find Morgan's own testimony demonstrates that fact.

eral Counsel maintained that there was little testimonial conflict as to what occurred during any of the meetings between Morgan and Respondent's hierarchy, straightforwardly asserting that: "Rogers admits Morgan was terminated because he believed she would continue to engage in union activities, including attending union meetings." The General Counsel also urged that, although Respondent engaged in such conduct under the "mistaken belief" that Morgan was a statutory supervisor, that fact would not relieve it of responsibility for having "violated Section 8(a)(1) and (3) of the Act as alleged in the complaint." We agree with the General Counsel's assessment to the extent that the evidence indicates Respondent's actions would have been unlawful if Morgan had been a statutory employee. Indeed, Morgan's own testimony to the effect that she believed, and asked, if she had been suspended for her own union activities, and was told that she had, confirms this.

In sum, we find, contrary to the Administrative Law Judge, that the evidence demonstrates that Respondent terminated Morgan not for declining to commit directed unfair labor practices, but rather, as alleged and urged by the General Counsel and argued by Respondent, because of her active participation in union activities and because Rogers "believed she would continue to engage in such activities, including attending union meetings." This finding is amply supported by Morgan's own testimony regarding the interview:

> He just asked me several different times if I was for collective-bargaining, if I would support the hospital, and he didn't like either one of the answers I gave.
>
> He said those were the two questions that I hadn't answered to his liking or whatever.
>
> Q. (By the General Counsel): He said that to you?
>
> A. Yes, and I'm not exactly sure what words he used, but he didn't like those answers, and until I could answer them to how he wanted them, then I would not be allowed to come back to work. That they were going to think about what I said and they would contact me the next, I think it was the next day and let me know what they had decided.

On April 7, Respondent sent Morgan a letter stating that Respondent had attempted without success to contact her by telephone on Friday, the day after the April 3 meeting, and that, after reviewing her suspension, had concluded that "we can no longer continue your employment."

While the discharge of a statutory employee for the reasons we have found above would clearly violate Section 8(a)(1) and (3) of the Act as alleged by the General Counsel, the discharge of supervisors as a result of *their* participating in union activities is not unlawful. (See *Parker-Robb, supra* at 403.)

We also conclude that the evidence does not warrant the finding of the Administrative Law Judge that Morgan was discharged in violation of Section 8(a)(4) because a charge was filed on her behalf. Morgan's own testimony was that Rogers did not indicate that any action would be taken against her because of such a charge. Nor do we construe the transcript of the April 3 interview to suggest otherwise. Indeed, the transcript of the recording—which Morgan but not the others knew about—clearly suggests that Rogers was not averse to having such a charge filed as he believed an investigation would support his view that Morgan was a statutory supervisor. Further, it appears that Respondent's decision to terminate Morgan was made prior to the Company's being made aware (on April 7) that a charge had been filed. Having found that Respondent's discharge of Morgan was not because of the charge, we shall also dismiss the 8(a)(4) allegations of the complaint.[8]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Humana of West Virginia, Inc. d/b/a Greenbrier Valley Hospital, Ronceverte, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order as so modified:

1. Delete paragraphs 1(a), (b), (c), (e) and 2(a) and (b), and reletter the remaining paragraphs accordingly.

2. Substitute the attached notice for that of the Administrative Law Judge.

[8] While we have adopted the Administrative Law Judge's finding, to which no exception was taken, that Respondent through Livingston violated Sec. 8(a)(1) in a conversation with employees after Morgan's discharge, we deem that insufficient to find the discharge itself unlawful in view of our discussion above and in light of evidence that supervisory personnel were instructed not to discuss reasons for Morgan's termination with employees, other than to indicate it was a personal matter.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT tell you that any of our personnel, including supervisors, have been discharged because they filed charges under the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your right to engage in union or concerted activities, or to refrain therefrom.

HUMANA OF WEST VIRGINIA, INC. D/B/A GREENBRIER VALLEY HOSPITAL

DECISION

STATEMENT OF THE CASE

MARVIN ROTH, Administrative Law Judge: This case was heard at Beckley and Lewisburg, West Virginia, on January 22 and 23 and February 3, 1981. The charge and amended charge were filed on April 2 and 18, 1980,[1] respectively, by United Steelworkers of America, AFL-CIO-CLC (herein the Union). The complaint, which issued on May 30, alleges that Humana of West Virginia, Inc. d/b/a Greenbrier Valley Hospital (herein Respondent or the Company) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act, as amended (herein the Act). The gravamen of the complaint is that the Company allegedly suspended and subsequently discharged employee Sarah Morgan because of her union and protected concerted activities, to discourage employees from engaging in such activity, and/or because she filed the original charge in this case, and allegedly engaged in unlawful acts of interrogation, threats of reprisal, creating the impression of surveillance, solicitation of antiunion activity, and announcement and granting of benefits in order to discourage support for the Union. The Company's answer denies the commission of the alleged unfair labor practices, including the alleged status of Morgan as an employee under the Act. All parties were afforded full opportunity to participate, to present relevant evidence, to argue orally, and to file briefs. General Counsel and the Company each filed a brief.

Upon the entire record in this case[2] and from my observation of the demeanor of the witnesses, and having considered the arguments of counsel and the briefs submitted by General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

The Company, a West Virginia Corporation, is engaged as a health care institution in the operation of a hospital located at Ronceverte, West Virginia (herein the hospital). In the operation of the hospital, the Company annually derives gross revenues in excess of $250,000 and annually purchases and receives at the hospital medicine and supplies valued in excess of $50,000 directly from points outside West Virginia. I find, as the Company admits, that it is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNION'S ORGANIZATIONAL CAMPAIGN, THE ELECTION, AND THE DISPUTED STATUS OF SARAH MORGAN

In February the Union commenced an organizational campaign among the hospital's employees. Third floor charge nurse Doris Hizer initially contacted the Union, and the first meeting was conducted at her home in Alderson, West Virginia, on Sunday, March 16. Two union representatives and some 5 to 10 hospital personnel were present, including Sarah Morgan, head nurse of the intensive coronary care unit (ICCU). The union representatives gave out literature and authorization cards. Subsequently Morgan distributed about 20 cards in various departments of the hospital, including ICCU. (Morgan had been off work for about 2 weeks because of a burned hand and returned to work on March 19.) Morgan did not attend any other union meetings prior to her discharge. The union adherents did not circulate any petition, nor does the evidence indicate that they considered or otherwise discussed the possibility of a strike. The Company suspended Morgan on March 28 and discharged her on April 7. On April 4 the Union filed petitions for Board-conducted elections in a nonprofessional unit and a professional unit (respectively, Cases 9-RC-13332 and 9-RC-13333). Notwithstanding the pending unfair labor practice charge, the parties entered into stipulations for an election which were approved by the Board's Regional Director for Region 9 on May 1. On May 22 an election was conducted in each unit. The Union lost both elections. No exceptions were filed, challenges were insufficient in number to affect the result of either election, and the results were certified. There were approximately 219 eligible voters in the nonprofessional unit and approximately 51 in the professional unit. The latter consisted of:

> All regular full-time and all regular part-time professional employees employed by the Employer at its Ronceverte, West Virginia, Hospital, but exclud-

[1] All dates herein refer to 1980 unless otherwise indicated.

[2] Certain errors in the transcript are hereby noted and corrected.

ing all nonprofessional employees, service, maintenance, technical, business office, clerical employees, confidential employees, guards and supervisors as defined in the Act.

As indicated, the stipulated unit did not expressly refer to head nurses, either by way of inclusion or exclusion. The Company's *Excelsior*[3] list of professional employees for the payroll period ending April 19 does not contain the names of any head nurses. Sarah Morgan (previously discharged) was the only head nurse who attempted to vote. As her name did not appear on the eligibility list, her ballot was challenged.

The Company contends in its brief that Morgan was a supervisory or managerial employee. General Counsel contends in sum that Morgan was an employee within the meaning of the Act but that her discharge was unlawful regardless of her status. However, as will be discussed, some of the allegations of the complaint are sustainable only if the evidence indicates that Morgan enjoyed employee status. Moreover, Board policy in cases such as these requires resolution of an alleged discriminatee's status even when supervisory status would not preclude a finding of unlawful conduct. *John Cuneo of Oklahoma, Inc.*, 238 NLRB 1438 (1978), enfd. *per curiam*, 106 LRRM 3077 (10th Cir. 1980). Therefore, before proceeding to the merits of the alleged unfair labor practices, it is first necessary to consider the status of Morgan as a head nurse.

I am not persuaded that the representation proceeding sheds any light on Morgan's status. In view of the Company's asserted position regarding head nurses, coupled with the suspension and discharge of Morgan, it is not surprising that head nurses failed to show up at the election, even if they might otherwise have been inclined to do so. Therefore, no inference is warranted that the head nurses regarded themselves as supervisors because they failed to present themselves at the polls (where in any event they would have been challenged). The status of head nurses was neither stipulated nor litigated in the representation proceeding. Although the Union filed an unfair practice charge on Morgan's behalf, and was represented by counsel at the hearing, the Union has not taken any position in this proceeding with regard to the status of head nurses.

In March 1980 George F. Livingston was executive director and James A. Hunter was personnel director at the hospital. The hospital comprised eight departments: nursing, X-ray, laboratory, housekeeping, maintenance, purchasing, dietary, and nuclear medicine. Brenda Tuckwiller was director of nursing and Billie Halstead functioned as her assistant. Three subordinate directors, who did not supervise any personnel, were each assigned to a specialized function. There was slots for five shift supervisors, but only two were filled at the time. A shift supervisor was normally in charge of the nursing department during night hours. The nursing department comprised a total of 133 employees. The nursing department had eight head nurses. One (Alma Lewis) was medical head nurse, and each of the others, including Sarah Morgan, was assigned to a specialized unit. No one within any unit ranked higher than the head nurses, each of whom was a registerd nurse (RN). The ICCU consisted of four RNs (including Morgan), four licensed practical nurses (LPNs), one graduate nurse (not yet licensed), two patient care assistants (PCAs), and one PCA who was then on maternity leave. The ICCU functioned a 12-hour shift, unlike the other units, which each operated on an 8-hour shift. Morgan normally worked the day shift (7 a.m. to 7 p.m.), and usually, but not always, was charge nurse nurse in the unit when she was on duty. For example, when Morgan returned from an absence of several days or more, another RN would continue to serve as charge nurse until Morgan became familiar with the patients. Eurcell Erwin, who normally worked the night shift (7 p.m. to 7 a.m.) was assistant head nurse and normally functioned as charge nurse on the night shift. No RN was permitted to function as charge nurse until the department determined that the individual was qualified in that capacity.

Assuming that the head nurses lacked supervisory authority, this would mean that the nursing department functioned with four supervisors for some 133 employees. This is an unlikely ratio, given the demanding nature of the work performed by the department employees, including the necessity to maintain adequate around-the-clock service. Assuming that the head nurses had supervisory authority, this would mean that there were 12 supervisors, or about 1 for every 12 employees, including 1 in each unit. This is a more realistic and probable ratio. Ratio may properly to be taken into consideration in determining alleged supervisory status of head nurses or other professionals in the health care industry. The foregoing figures tend to corroborate testimony and other evidence to the effect that Morgan and other head nurses exercised supervisory authority. See *Wright Memorial Hospital*, 255 NLRB 1319 (1980); *A. Barton Hepburn Hospital*, 238 NLRB 95, 104 (1978); compare *McAlester General Hospital, Inc. d/b/a McAlester General Hospital*, 233 NLRB 589 (1977), cited by General Counsel (br. 19, 22).

Much disputed testimony was adduced concerning the extent of authority exercised by Morgan in her capacity as head nurse. Morgan herself was General Counsel's principal witness on this issue. Employees Eurcell Erwin, Vona Winston, and Nancy Cameron, all of whom worked in ICCU (Winston as an LPN and Cameron as a PCA), also testified for General Counsel. Billie Halstead and Brenda Tuckwiller were the Company's principal witnesses on the status of Morgan. Former hospital employees Cindy Miller and Connie Black, who worked in ICCU as RNs, also testified as company witnesses.[4] Halstead in particular impressed me as a credible witness. At the time of the present hearing Halstead was living in Camilla, Georgia. The record does not indicate her present employment, if any. Halstead was demonstrably meticulous in her testimony. She tended to use her own words rather than those of the questioning attorney, and to correct the attorney when she thought it necessary. In contrast, Morgan on several occasions professed inability

[3] *Excelsior Underwear Inc. and Saluda Knitting Inc.*, 156 NLRB 1236 (1966).

[4] At the time of the present hearing, Miller was employed at a Humana hospital in Louisville, Kentucky.

to recall aspects of her work history and that of the ICCU unit. This professed inability seems uncharacteristic of Morgan, a highly motivated and conscientious professional who, as indicated by company records, was capable of absorbing, recording, and retaining minute information concerning her work, that of the ICCU, and the hospital. (She did not display such lapses of memory when testifying about the interviews leading to her suspension and discharge.) The testimony of the other General Counsel witnesses tended to be somewhat generalized when contrasted with the specific incidents described by the company witnesses.[5] Unless otherwise indicated, I have credited the testimony of Halstead where it conflicts with that of Morgan.

Company records which were prepared prior to the Union's organizational campaign, and some of which were acknowledged by Morgan, tend to indicate that the hospital and Morgan understood that head nurses in general and Morgan in particular were authorized to carry out functions of a supervisory nature. Morgan's job description, prepared and acknowledged by Morgan in 1978 when she was acting head nurse of ICCU, indicates that the head nurse is "responsible for supervision and administration" of ICCU, including "the overall planning and organizing of activities in the unit" and "directing, coordinating and controlling the functions of the department. . . ." The job description indicates that the duties of the head nurse include planning, direction, and control of the staffing assignment plan "in accordance with objectives" of required around-the-clock coverage and effective utilization of workers, development of long range scheduling plans, review and revision of policies within the ICCU unit, assisting in making detailed written work plans and assignments for the unit, preparation of performance evaluations on unit personnel, submission of written reconmendations for promotion, transfer, leave of absences or termination, and review of such evaluations "to direct supervisory staff in counseling personnel." When Morgan became acting head nurse, the hospital authorized a pay increase in part because the position "involves scheduling, evaluating and managing a special care area responsible for employees, majority of who are especially trained in intensive care." In a performance evaluation on Morgan by nursing director Tuckwiller, dated June 25, 1979, Tuckwiller recommended and the hospital approved a merit increment for Morgan. Tuckwiller concluded that Morgan "has grown tremendously in ability to manage subordinate employees." In the written evaluation, Tuckwiller commented, *inter alia*, that Morgan coordinated personnel, was becoming more proficient as a manager, attempted to meet the needs of the unit and the employees, and "must continue to be constantly aware of her example to other employees as a supervisor." In the space for employee comments, Morgan stated that she believed the evaluation was fair and that she hoped to improve in making schedules and utilizing people. Although these records are not complete or entirely accurate in describing the functions actually performed by Morgan, they do tend to corroborate the testimony of company witnesses to the effect that, in performing the supervisory-type functions in question, Morgan was exercising independent judgment rather than carrying out assignments of a routine or clerical nature.

Morgan spent most of her working time in the performance of "hands on" patient care. Indeed, the entire nursing staff, from the director on down, were called upon to perform such work when and as needed. The ICCU worked as a team. As the unit employees were familiar with their everyday duties, they required minimal on-the-job direction. To the extent that Morgan gave such direction, she usually did so by reason of her status as a RN or charge nurse; i.e., the direction was incidental to her professional work, and reflected her greater training, experience, and qualifications. However, Cindy Miller and Billie Halstead testified, in sum, that Morgan prepared in advance a list of assignments for employees on each shift, which did not relate directly to patient care; e.g., checking the crash (emergency) cart, ordering supplies, checking bedside tables and making up charts. Morgan's testimony regarding this list was vague and confused. In essence, Morgan denied that she originated the form which was used to assign these duties, but she did not make clear who actually made the assignments. I credit Miller and Halstead, and I find that Morgan made these assignments in the exercise of a supervisory rather than a professional function.

It is undisputed that Morgan in her capacity as head nurse prepared unit work schedules for 2-week periods. These schedules were subject to final approval by the director or assistant director of nursing. As indicated by her job description, Morgan in preparing these schedules was guided by the necessity of maintaining around-the-clock coverage and effective utilization of personnel. It is evident from Morgan's own testimony that, within these limitations, she exercised independent judgment and, in particular, that she endeavored to schedule the work in such a manner as to insure maximum morale and minimum friction among the employees. In many respects her function was neither routine nor clerical in nature. Morgan testified that time off at Christmas was a problem. According to Morgan, she resolved the problem by giving the employees a choice of taking off (1) Christmas Eve or Christmas Day, and (2) Thanksgiving or New Year's Day. (The minutes of a unit meeting on October 17, 1979, further indicated that Morgan resolved any conflict of choices on the basis of seniority and 1978 choices.) Morgan testified that "it worked out real well." It is evident from Morgan's testimony that she originated and carried out this arrangement on her own initiative. Evidence concerning the origin of the 12-hour shift in ICCU is even more illuminating. Until late December 1979 the ICCU, like all other units, operated on three shifts. However, during the last week in December Morgan and Eurcell Erwin switched to the 12-hour shift, and beginning in January the entire unit switched to the 12-hour rotating shifts (Morgan as usual prepared the schedule). The other units remained on three shifts.

[5] Cameron did not impress me as a particularly reliable witness. She initially testified that Morgan performed all of the work which was performed by other unit employees, and nothing else! However, in response to prodding questions from General Counsel, Cameron testified as to functions which were performed only by Morgan.

Morgan in her testimony was vague as to the origin of the new system. On her direct examination Morgan testified that she thought Tuckwiller suggested it. However on cross-examination Morgan admitted that she suggested and presented the idea to the employees at a unit meeting, and that Tuckwiller was not present at the meeting. Connie Black categorically testified that the 12-hour shift was Morgan's idea. Cindy Miller testified that Morgan decided to put it to a vote, and the employees voted their approval. Barbara Tuckwiller testified in sum that she and Morgan discussed the chronic problem of inadequate staffing in the unit, that Morgan told her she discussed the problem with the unit employees and that they were willing to try 12-hour shifts and that Tuckwiller went along with the idea. When an applicant was interviewed for a position in ICCU, Tuckwiller requested Morgan to explain the 12-hour shift system. (Under the 12-hour shift, each employee normally worked 4 days one week, then 3 days the next week, and then took 7 days off). Billie Halstead was of the opinion that the 12-hour shift was costing too much in overtime. Nevertheless the system remained in effect, although some employees sometimes reverted to an 8-hour shift. I credit the testimony of the Company witnesses. I also agree with the Company's argument that the fact that Morgan submitted the 12-hour shift to a vote, and similarly sought a concensus on other matters, tends to indicate an exercise rather than a lack of discretionary authority. In essence, Morgan chose to run the unit in a democratic rather than an authoritarian manner. After the schedule was made up, employees sometimes expressed a preference for a change in their schedule. In such cases employees usually could and did arrange to switch shifts (notifying Morgan or the charge nurse), although they could not in this manner agree to alter the staffing pattern; e.g., an LPN and a PCA could not agree to switch shifts without approval from the nursing office. However, conflicts sometimes arose, and in such cases Morgan would resolve the conflict if the employees were unable to do so among themselves. As evidenced by the testimony of Eurcell Erwin, Morgan was authorized to and did approve overtime work for employees on all shifts. Thereby in practical effect Morgan approved overtime pay. Morgan also authorized days off with vacation or sick pay, subject to final approval by the personnel office. Brenda Tuckwiller and Billie Halstead testified in sum that Morgan prepared vacation schedules. (Usually employees were granted vacation time in accordance with their requests.) According to Tuckwiller, the schedules were forwarded to the personnel office for the purpose of checking whether the employee had sufficient accumulated vacation leave time. Morgan testified that at one time the head nurses scheduled vacations, but this policy was changed. According to Morgan, the employees were given forms to indicate their choices, and they turned in the forms to Morgan, but she did nothing more than transmit the forms to Tuckwiller who in turn sent them to the personnel office. I credit Tuckwiller and Halstead. If Morgan played no role in the scheduling of vacations, then it is difficult to see why the employees could not hand in their requests directly to the nursing office. In her investigatory affidavit, Eurcell Erwin stated that the employees were required to give 30 days' advance notice to Morgan of their vacation requests. Moreover, it is unlikely that either the nursing office or the personnel office was in a position to prepare a vacation schedule for ICCU without some guidance from its head nurse (see my previous discussion concerning ratio). Morgan approved the payroll attendance sheets which were filled out by the ICCU employees, subject to review by the nursing office (Tuckwiller and Halstead) for conformance with hospital policies and practices. Thereby in practical effect Morgan approved pay for the employees in accordance with those sheets, as they were the basis for employee paychecks. Morgan testified that she never made changes or corrections on the sheets, and that she thought Tuckwiller told her she had no authority to do so. However, payroll attendance sheets which were presented in evidence indicate that Morgan made notations which could or would affect the employees' pay; e.g., that an employee worked without a lunchbreak. Again with ratio in mind, it is unlikely that the nursing office would be in a position to meaningfully pass on the attendance sheets without initial review and certification by the head nurse.

Sometimes ICCU was overstaffed, and at other times it was understaffed. With regard to the former, the hospital normally operated under a policy whereby each shift in each unit was assigned a designated ratio of patients to staff (PMR). The charge nurse was responsible for keeping count of the PMR and informing the nursing office of the PMR. The PMR was not inflexible. A unit might be permitted to keep on one employee in excess of the authorized PMR in special circumstances; e.g., when a patient required extra care. The head nurse made the initial determination and recommendation to the nursing office concerning the need for extra help. I find that the head nurse's discretion in this regard constituted an exercise of professional judgment rather than supervisory authority.

If the PMR count was excessive and there were not extenuating circumstances which warranted extra personnel, a unit employee would be sent home (or called and told not to come in if the employee had not yet reported to work) or the employee would be temporarily transferred elsewhere on the floor in order to attain the proper ratio. The latter alternative rested with the nursing office, as such transfers necessarily involved staffing across unit lines. If a transfer was not possible the head nurse would endeavor to find a unit employee who was willing to take a day off or agree to a change in schedule. If none could be found, the head nurse selected an employee for layoff. However, the head nurse had little room for discretion in this choice, as employees were normally laid off in inverse order of rank. I find that Morgan exercised some, albeit limited, supervisory authority in determining which employee should be sent home or told not to come in.[6]

[6] It is immaterial who actually made the telephone call to inform an employee not to come in to work. This was simply routine effectuation of the actual decision.

In the converse situation, i.e., a shortage of unit personnel, the head nurse also made the initial determination and recommendation to the nursing office as to need. I find that here too the head nurse exercised professional judgment rather than supervisory authority. There were several alternative means of meeting the need: overtime work, summoning a unit employee who was "on call," obtaining an employee from another unit or the nursing pool, or obtaining a "Janet nurse," i.e., temporary outside help. The first two alternatives were normally utilized if possible, i.e., help within the unit, and here Morgan exercised discretion of a supervisory nature. As heretofore found, Morgan had authority within the limitations of hospital policy to approve overtime for unit employees. Connie Black testified that on one occasion Morgan put herself "on call." An employee on call is an off-duty employee who is available to come in to work on short notice. The employee is paid a daily rate for being on call. Brenda Tuckwiller testified that the head nurse decides which employee or employees should be on call, and that the charge nurse decides who to call. I credit Black and Tuckwiller, and I find that Morgan exercised supervisory authority by designating employees including herself for on call duty, and thereby in practical effect authorizing them to work and be paid accordingly. If a personnel shortage could not be remedied within the unit, Morgan would notify the nursing office or shift supervisor, who would obtain help from outside the unit.

Morgan prepared detailed written annual evaluations (employee performance appraisal) for every unit employee except herself. (Tuckwiller prepared the evaluation on Morgan.) Morgan would then discuss the evaluation with the employee, invite questions and comments (written on the evaluation form if the employee chose to do so), and then submit the evaluation to the nursing office. Morgan also prepared such evaluations when the employee met the educational and experience qualifications for a promotion. Morgan sometimes delegated the preparation of evaluations, e.g., to assistant head nurse Eurcell Erwin when the employee involved regularly worked nights, or to Erwin or another RN if Morgan was out of town or on leave when an evaluation was due. However, Morgan normally prepared the evaluations or reviewed them if she returned in time. In so doing she drew upon her own knowledge and upon information obtained from other RNs. At one time the evaluation form contained an entry for recommendation as to an "increment." However, beginning in 1979 the hospital utilized forms which did not contain such an entry. In fact, the former recommendation was largely meaningless, because each employee, after the annual evaluation, normally received some pay increase unless the employee's performance was so bad as to indicate the need for transfer to a less demanding position, or for eventual termination if the employee failed to improve. What is significant, as Morgan knew perfectly well, was that the evaluations were used by the nursing and personnel offices as the basis for determinimg the amount of increase and, as indicated, for transfer or disciplinary action. The hospital gave annual pay increases on the basis of merit rather than on the basis of seniority or other factors. In accordance with hospital policy, Tuckwiller approved annual increases ranging from 6 percent down to nothing, depending upon the employee's performance as measured in the evaluation. The "manager" (old form) or "supervisor" (new form), i.e., Morgan, rated the employees on a scale of 1 to 10 in various categories of performance, gave an overall performance rating, and entered comments and recommendations for improvement. Sarah Morgan testified to the effect these evaluations amounted to nothing more than written rationalizations for decisions already made by the nursing office. I do not credit this assertion. The evaluations by Morgan which were presented in evidence indicate that Morgan prepared them in a thorough, detailed, and if necessary brutally frank manner. It is evident that Morgan knew that she was not simply engaging in a superfluous function, and it is unlikely that the hospital would have assigned its head nurses to waste their valuable time in such a manner. I find that through these evaluations Morgan effectively and meaningfully, and in the Company's interest, recommended pay increases, transfer, or disciplinary action for unit employees.

I further find that, in addition to the written evaluations, Morgan verbally made effective recommendations regarding hire, transfer, and promotion of employees, that the Company, while not always following those recommendations, normally gave them considerable or controlling weight, and that Morgan, acting in the Company's interest, disciplined employees in a manner which required the use of independent judgment. Morgan testified concerning instances in which her recommendations were not followed by the nursing office. However, her own testimony confirms that she was regularly involved in the decisional process. Prospective new employees, after being interviewed by the nursing office, were sent to ICCU, where Morgan gave them an informal orientation lecture. Morgan had an initial veto power over the hire of new employees into ICCU, although because of a shortage of trained personnel she rarely if ever exercised that power. However, Morgan did not hesitate to recommend that poor performers be assigned elsewhere. As such determinations affected more than one unit, the nursing office did not always follow her recommendations. However, as indicated, she was regularly consulted by Tuckwiller and Halstead on any personnel action affecting ICCU, and her recommendations were normally given substantial or controlling weight. I specifically credit the testimony of Tuckwiller and Halstead to the effect that they approved rejection of Marty Hefner and Debbie Brown as charge nurses, the transfer of LPN Kathy Kountz out of ICCU, and the promotion of Eurcell Erwin to assistant head nurse, all primarily on the basis of Morgan's recommendations.[7] As for discipline, I

[7] Morgan testified in sum that Halstead told her that she (Halstead) was considering Connie Black and part-time nurse Barbara Wade for the position of assistant head nurse, that Morgan urged her to consider Erwin, but recommended Black, and that Halstead nevertheless chose Erwin. The explanation is somewhat inherently implausible. I credit Tuckwiller's testimony that the candidates were Black and Erwin, and that Tuckwiller went along with Morgan's recommendation that Erwin be promoted because of her greater maturity and experience. As for

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credit Morgan's testimony to the extent that she usually (but not always) consulted with Tuckwiller or Halstead before counseling with or admonishing employees concerning their deficiencies. However, Morgan did not simply convey messages from the nursing office. Rather, Morgan spoke privately with individual employees, or to the employees in a group at unit meetings, and she followed through on these matters to see that the problems were corrected, including use of adverse evaluations if warranted. For example, when doctors complained to Tuckwiller that night-shift employees were knitting or reading during slow periods, Morgan spoke privately to Eurcell Erwin (apparently the principal offender) and also spoke to the employees in a group, until she was satisfied that the matter was corrected. It is significant that, although the problem pertained exclusively to the night shift (day-shift employees were usually too busy for such diversions), the nursing office chose to remedy the problem through Morgan.[8] Similarly, at a unit meeting on April 5, 1979, Morgan admonished the employees that "backstabbing, jealousy, gossiping and trouble making had to stop!" (The significance of these meetings will be discussed shortly.) Acting at Tuckwiller's direction, Morgan counseled LPN Gertrude Gillilan concerning her work deficiencies, and prepared a written record of reprimand (including a warning of possible transfer) which was placed in Gillilan's personnel file.

Additional evidence further tends to indicate that Morgan enjoyed supervisory status and was authorized to and did exercise supervisory authority.[9] Head nurses including Morgan were regularly called upon to serve as acting shift supervisors on weekends and sometimes at other times. As the hospital had only two regular shift supervisors, these occasions were not isolated or insignificant. It is undisputed that the shift supervisors were supervisors within the meaning of the Act. The Company regularly used personnel forms; e.g., evaluations and disciplinary warnings, which were shown to the employees and which indicated that Morgan was a supervisor or manager. Morgan presided at unit meetings which were normally held monthly. One of the employees present would prepare written minutes of the meeting, which were approved by Morgan, sometimes after her revision, and the minutes were entered in the procedure and policy books which were maintained in the unit and to which all employees had access. Therefore, to the extent that the minutes purported to indicate hospital policy and procedures, they did in fact constitute such policies and procedures in the unit. Morgan also updated and revised the books as warranted. Most of the entries concerned nursing, i.e., professional Procedures, and others were simply in the nature of routine announcements. However, the minutes indicate that Morgan also utilized these meetings to announce and explain company personnel policies, and to admonish or counsel the employees concerning nontechnical aspects of their performance; e.g., as indicated, their attitudes and behavior toward each other. Morgan regularly attended and participated in the head nurse meetings which were normally held monthly. Brenda Tuckwiller or Billie Halstead presided at these meetings, and Personnel Director Hunter was sometimes present. Unit personnel (other than the head nurse) normally did not attend these meetings.[10] Morgan testified without contradiction that it was her understanding that she was required to attend the head nurse meetings, but that on March 16, 1980, Tuckwiller told her that she did not have to attend the meetings. In fact, Tuckwiller made this statement in a conversation which took place on March 19, when Morgan returned to work after being on disability leave. In light of that conversation and subsequent developments, which will be discussed, the inference is warranted, and I so find, that the Company knew or suspected that Morgan attended the union meeting on March 16, that it anticipated that the union activity and the Company's policy toward that activity would be discussed at head nurse meetings, and that therefore the Company did not want Morgan to attend such meetings as a matter of course (unless summoned) until her position was clarified. Subsequent to Morgan's discharge, Executive Director Livingston told assembled groups of employees that the duties of head nurses were being enlarged, that they were given authority to grant wage increases and interview job applicants (which they did not previously enjoy), and that head nurses would be made department heads and supervisors would be made managers. One may speculate as to the Company's motives for this action. However, the question at issue is whether Morgan was a supervisor within the meaning of the Act as of March 1980. Therefore, resolution of her status must be based on evidence pertaining to her status prior to her suspension on March 28.

In determining whether health care professionals, including registered nurses, are supervisors within the meaning of the Act, the Board applies the traditional standards which are generally applicable for determining supervisory status, subject to the qualification that a health care professional does not exercise supervisory authority in the interest of the employer when that individual's direction to other employees is in the exercise of professional judgment incidental to the professional's treatment of patients. *Turtle Creek Convalescent Centres, Inc.*, 235 NLRB 400, fn. 3 (1978), citing *Sutter Communi-*

Kountz, Morgan testified that the was transferred out of ICCU on the basis of low seniority and that, when the decision was made, Halstead asked Morgan to do an evaluation of Kountz. If seniority was the basis for Kountz' transfer, it is unlikely that Morgan would have added insult to injury by giving her the devastating evaluation which she did, in which Morgan recommended Kountz' transfer because of poor performance.

[8] I do not credit the testimony of Erwin that she did not recall any comments about her crocheting while on duty. Sarah Morgan testified that she personally spoke to Erwin about the problem.

[9] Morgan was paid an hourly wage which was the highest in the unit, being slightly higher than that paid to the assistant head nurse. I credit the testimony of Tuckwiller that all head nurses were offered the choice of salary or an hourly wage, but that all but one chose hourly pay because it afforded an opportunity to earn overtime pay. As indicated, Morgan was in a position to assign overtime work to herself if she wished.

[10] The Company offered in evidence, over the objection of General Counsel, purported minutes of those meetings which were attended by Morgan. I admitted the minutes into evidence, subject to testimony concerning their authenticity or accuracy. No such testimony was forthcoming, although the minutes were purportedly signed by Tuckwiller. Therefore, I have not given any evidentiary weight to those minutes.

ty Hospitals of Sacramento, Inc., 227 NLRB 181, 192 (1976). In *N.L.R.B.* v. *Yeshiva University*, 444 U.S. 672, 681–682, 690 (1980), the Supreme Court, although not directly concerned with this area, implicitly approved the Board's policy, and indeed cited *Sutter* with approval. Applying that policy to the facts of the present case, I find on the basis of the credited evidence that Sarah Morgan was at all times material a supervisor within the meaning of the Act. Specifically, Morgan in the Company's interest and through the use of independent judgment was authorized to and did assign, responsibly direct, and discipline employees, and adjust their grievances, and effectively recommend their hire, transfer, recall, promotion, layoff, reward, and discipline. Her authority and functions in these areas went beyond the exercise of professional judgment incidental to her treatment of patients. See and compare *A. Barton Hepburn Hospital, supra*, 238 NLRB 95; *Newton-Wellesley Hospital*, 219 NLRB 699 (1975), cited by General Counsel in its brief (pp. 18, 19, 20, 22); *Exeter Hospital*, 248 NLRB 377 (1980) (charge nurses). With regard to *Newton-Wellesley*, I find that Morgan's authority and functions were more comparable to the nurse leaders (found to be supervisors) than to the head nurses (found not to be supervisors) in that case.[11] However, I do not agree with the Company's contention (Resp. br., pp. 7–8) that Morgan was a managerial employee. Managerial employees are those who "formulate and effectuate management policies by expressing and making operative the decisions of their employer . . . normally an employee may be excluded as managerial [from coverage of the Act] only if he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy" *N.L.R.B.* v. *Yeshiva University, supra*, 444 U.S. at 682–683. "Thus, managerial status is conferred only upon those in executive-type positions whose interests are closely aligned with management as true representatives of management." *Sutter Community Hospitals, supra*, at 193 cited with approval in *Yeshiva* at fn. 14. However, Morgan simply exercised supervisory discretion within the narrow limits set by higher authority. See *John Cuneo of Oklahoma, Inc., supra*, 238 NLRB 1438, fn. 2.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Morgan's Suspension and Discharge, and Additional Alleged Violations of Section 8(a)(1) of the Act Involving Morgan*

On March 19, the day Morgan returned to work, Brenda Tuckwiller approached her in ICCU. After discussing utilization of available beds, Tuckwiller informed Morgan that she did not have to attend head nurse meetings and therefore did not need additional temporary help requested by Morgan. Tuckwiller then summoned Morgan into the kitchen where they could not be overheard.[12] Tuckwiller said she heard there was a meeting with "an outside agency" in Alderson on Sunday, and asked whether Morgan was there and what it was about. Morgan asked what kind of outside agency. Tuckwiller answered that some employees were unhappy about their salaries, so they contacted the agency. Morgan responded that salaries were not the only thing the people were upset about. Tuckwiller said that she knew someone from ICCU was at the meeting, and asked who it was. Morgan answered that if the meeting was on the employees' own time and away from the hospital, it was none of Tuckwiller's business. Tuckwiller then left. However, on the morning of Friday, March 21 Morgan was summoned to a head nurse meeting. Morgan arrived while the meeting was in progress. Morgan testified that Executive Director Livingston, Personnel Director Hunter, the department heads, and head nurses were present. In light of her testimony and my prior findings concerning the status of head nurses, I find that the evidence fails to indicate that any of those present were employees within the meaning of the Act. Morgan testified that Hunter was speaking. According to Morgan, Hunter said he was sorry that some people in the hospital were so unhappy that they went to "an outside agency," and that "it was our fault and we had let them down." After identifying the agency as being a union, Hunter said that if the Union came in they would replace "us," i.e., those present at the meeting. Hunter asked those present to give him any information they might have. Morgan testified that Hunter was the only person to speak at the meeting. I credit the uncontroverted testimony of Morgan concerning this meeting.

Shortly after the meeting Morgan was summoned to the conference room. Hunter, Livingston, and Tuckwiller were present. According to Morgan, Hunter said he heard from "a third party" that Morgan was "passing petitions," Morgan denied that she passed a "petition" or that she had seen one. Morgan further testified that Hunter said that "if a person was passing such a petition that it would be considered as a slowdown in work or a work stoppage and they would be suspended for three days." According to Morgan, Hunter said he heard there would be a walkout, and Livingston asked if Morgan planned to walk out. Morgan answered no. Hunter said there was a rumor in the hospital that there were over 100 names on "this petition," and that if there were that many she must have forged the signatures. Morgan responded that the ICCU employees were unhappy and would probably vote for the Union. Livingston argued that most of the hospital employees were happy. The discussion continued along this line, with no agreement. Hunter asserted that if the Union won she would be replaced or ignored. Morgan was then instructed to return to work. Morgan testified that about 3 p.m. Tuckwiller gave her a copy of the manager's manual, saying that it was her copy (Morgan was not previously given a copy of the manual). Morgan testified that about 4 p.m. she

[11] In determining that Morgan was a supervisor, I have not relied upon my finding that Morgan independently authorized overtime. In *A. Barton Hepburn Hospital, supra*, 238 NLRB 95, fn. 2, the Board declined to rely upon a similar finding by the Administrative Law Judge in that case. The Board gave no explanation. However, the only apparent rationale would seem to be that the Board regarded this as an exercise of professional judgment.

[12] LPN Vona Winston overheard the first part of the conversation, and testified concerning the same. Tuckwiller in her testimony did not dispute Morgan's version of their conversation.

was summoned to a second meeting in the conference room at which Livingston and Tuckwiller were present. According to Morgan, Livingston said he had a witness who saw the "petition" that she "was passing." Morgan responded that she was tired of Livingston's accusations, and asked to talk to the witness. Livingston said he would try to get the witness. Livingston then left the conference room, leaving Morgan and Tuckwiller alone. According to Morgan, Tuckwiller said that if Morgan had such a petition she "would be suspended for three days for work stoppage or slow down the work." Morgan asked what would happen if she did it on her own time, and Tuckwiller answered that she would have to ask Hunter. Livingston returned to the conference room and told Morgan that the witness had already gone home. Morgan was then sent back to work.

Livingston and Hunter were not presented as witnesses in this proceeding. Tuckwiller was the Company's only witness concerning the events of March 21. Tuckwiller testified that she was present at a meeting which included herself, Morgan, Livingston, and Hunter. Tuckwiller testified that Hunter asked her to sit in on the meeting because an employee reported seeing "a petition in intensive care related to some sort of employee complaints." (As heretofore found, the evidence fails to indicate the existence of any such petition, unless as argued by the Company (Resp. br., p. 9) the union authorization cards should be considered as a petition.) According to Tuckwiller, Livingston and Hunter asked Morgan if she circulated a petition. Morgan answered that she did not and that she had no knowledge of such a petition. Hunter informed Morgan that, under the manager's manual and company policies, supervisors "must act as leaders in this type of situation," and that "if we had knowledge of any action of this type, we must do our part to act as leaders and talk with the employees and find out what the problem was and bring it to the management's attention." According to Tuckwiller, Hunter said that "any employees who would engage in any sort of outside agency activity which would result in work stoppage at a health care institution; that is, any of these employees overtly participating in this type of activity could face suspension or discharge." Tuckwiller did not testify about the second meeting in the conference room, nor did she deny that the second meeting took place. Apart from the Company's failure to present Livingston and Hunter as witnesses (which will be discussed at a later point in this Decision) Tuckwiller's version of the first meeting, superficially at least, conflicts with that of Morgan in only one material respect; namely, Hunter's definition of activity which would constitute grounds for suspension. However, when viewed in context the versions of Morgan and Tuckwiller are not inherently inconsistent even in this regard. The statements made by Livingston, Hunter, and Tuckwiller to Morgan indicate that the Company was receiving information concerning the union campaign. The record evidence indicates that at this point the union activity substantially consisted of a meeting, followed by solicitation of authorization cards. The evidence fails to indicate that any petition was circulated, or that anyone called for a strike. Rather, company counsel argues that card solicitation should be considered as tantamount to a petition. Even on the basis of Tuckwiller's version of the first conference room meeting, it is evident that the Company was taking the position that any union organizational activity constitutes the kind of conduct which could result in a work stoppage. Hunter did not say that employees could be suspended for engaging in a work stoppage. Rather, he was telling Morgan that employees could or would be suspended or discharged for engaging in union organizational activity; i.e., the kind of activity which in the Company's view could result in a work stoppage. Indeed, it is evident that Morgan so understood Hunter's meaning when she asked Tuckwiller whether she could be suspended for passing a petition on her own time. Hunter did not limit his remarks to supervisory or managerial personnel. In essence, Hunter told Morgan that any employee who engaged in union organizational activity (subjectively considered by the Company to be incitement of a work stoppage) would be suspended for 3 days, and that in the event of an actual work stoppage the employee could be suspended or discharged by reason of the organizational activity. I credit the testimony of Morgan and Tuckwiller concerning the March 21 meetings, and I find that their testimony together represents the substance of those meetings.

General Counsel alleges, complaint 5(a)(b) and (c)(i), that the Company, through Tuckwiller, Hunter, and Livingston, violated Section 8(a)(1) of the Act by interrogating Morgan concerning union activities, creating the impression of surveillance, and threatening her with suspension and loss of her job. These allegations were premised on General Counsel's position that Morgan was an employee within the meaning of the Act. Having sustained the Company's position that Morgan was a supervisor, I must now evaluate these allegations on the basis of the law applicable to supervisory personnel. It is not an unfair labor practice for an employer to question its supervisory personnel about union activity, to ask them to report any knowledge they might have of such activity, to inform them that the employer has knowledge of such activity, or to threaten them with suspension or loss of employment because they engage in such activity or if the employees select a union as their bargaining representative, unless in so doing the employer expressly or impliedly requests or directs the supervisor to engage or participate in the commission of unfair labor practices. *Russell Stover Candies, Inc.*, 223 NLRB 592, 600 (1976), enfd. 551 F.2d 204 (8th Cir. 1977); *Western Sample Book & Printing Co., Inc.*, 209 NLRB 384, 390 (1974); *National Industrial Constructors, Inc.*, 225 NLRB 672, 674–675 (1976). Applying this standard to the present case, I find that the Company, through Hunter, violated Section 8(a)(1) of the Act by impliedly requesting and directing Morgan to engage in unfair labor practice conduct. Specifically, Hunter directed Morgan to interrogate employees concerning union activity. Hunter did not simply ask Morgan to report any union activity of which she had knowledge. Rather, on the basis of Tuckwiller's testimony, it is evident that Hunter directed Morgan to question employees about their reasons for wanting a union, and to report the results to management. Therefore the Com-

pany violated the Act by directing Morgan to engage in unlawful interrogation. See *Russell Stover Candies, supra.* I further find that the Company violated Section 8(a)(1) by impliedly directing Morgan to discipline or recommend discipline of employees who engaged in union or other concerted activity protected under Section 7 of the Act. Hunter informed Morgan that employees could or would be suspended or discharged for engaging in union organizational activity, without indicating any qualifications as to the time or place of such activity. However, employees of a health care facility have a statutorily protected right to engage in union "solicitation or distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health care operations or disturbance of patients." *Beth Israel Hospital* v. *N.L.R.B.*, 437 U.S. 483, 507 (1978). The Company could not justify a blanket prohibition against union organizational activity on the ground (suggested by Hunter) that such activity could result in a strike. Such a theory runs counter to and would effectively nullify the Supreme Court's rationale in *Beth Israel.* As head nurse of ICCU, Morgan was responsible for keeping the unit employees informed as to company personnel policies, for reprimanding employees who violated such policies, and for recommending further disciplinary action if warranted. Therefore Morgan could reasonably infer that she was expected to communicate and assist in enforcing the Company's unlawful policy. I further find, in light of subsequent developments which will be discussed, that Hunter's statements may properly be considered as evidence bearing on the reason or reasons for Morgan's suspension and discharge.

On Tuesday, March 25 Sarah Morgan was again summoned to a meeting of department heads and head nurses. Hunter informed them that a company official would be coming to the hospital to talk to the hospital personnel and "find out what the problems were." Morgan told Hunter that she would be off for 2 days. Hunter replied that he would arrange a meeting between Morgan and "this person." Morgan returned to work on Friday, March 28, when she attended one of a series of meetings to which the Company summoned all personnel who could be present. Morgan testified that a company official, whose name she could not recall, addressed the meeting and spoke about the Union. Morgan testified that, she did not recall walking out of any meeting. Billie Halstead testified that, at one meeting, a company official named Frank Lambert said that head nurses and other department heads who were in sympathy with the Union were not supervisors, whereupon Morgan got up and walked out of the room. I credit Halstead.

Following the general meeting Morgan was summoned to the conference room, where she met alone with L. J. Rogers, of Humana Corporation's personnel department (Humana Corporation, the Company's parent corporation, maintains its principal offices in Louisville, Kentucky). Morgan testified that Rogers asserted that he knew she was working for the Union, but that as a supervisor she was required by law to support the hospital. According to Morgan, she disagreed that she was a supervisor. Morgan testified that Rogers told her she would have to pass out literature, talk to the ICCU employees and try to sway their vote against the Union, and that she replied that she did not think she could do that. According to Morgan, Rogers said that he would give her time to think about it, that she should reconsider and call him, but that if she did not do so, some action would have to be taken because of her failure to comply with company policies. Rogers said that he would speak to her later in the day. Morgan testified that Rogers did not then accuse her of passing out petitions. That afternoon Morgan was again summoned to the conference room. Rogers and Hunter were present. According to Morgan, Rogers asked if she had thought about their conversation, and if she could do what they wanted—specifically to pass out literature and talk to the employees. Rogers said he would tell Morgan what to say to them. Morgan answered that she could not do that, because she believed that the employees should make up their own minds without being pressured by anyone. Rogers replied that it was her duty as a supervisor to support the hospital, that she would be suspended for 7 days and that if she changed her mind during this period she should contact Hunter. Following the meeting Morgan asked for and was given a written notice of suspension, signed by Tuckwiller and Livingston, which indicated that she was suspended "for indisposition to comply with Company policy." Morgan next contacted the Union, and on April 2 the Union filed the initial unfair labor practice charge in this case, alleging that Morgan was suspended for refusing to hand out antiunion literature and to instruct other employees to refrain from union activity.

Rogers testified that he suspected that Morgan was involved in union activity. He further testified that in their first meeting she talked about the hospital's problems, and indicated that she favored collective bargaining. According to Rogers, he told her that as a supervisor she could not engage in union activity, that she insisted she had a right to do so, and that he said he would speak to her later in the day. In sum, Rogers testified that the first meeting essentially concerned the question of whether Morgan could or should engage in union activity. However, in testifying about the second meeting, Rogers shifted gears, so to speak. According to Rogers, Morgan began by asking him what he wanted her to do, and he answered that "I want you to take material to employees, and I will tell you what to say." Rogers testified that Morgan said she did not think she could do that, that Rogers asked her if she could take a neutral position, and she said she could not. Rogers then told Morgan that she was suspended for 7 days, and that if during that period she thought she could return to work, she should do so. Rogers' version of the second meeting tends to corroborate Morgan's version of a first meeting; i.e., that Rogers asked Morgan to engage in antiunion activity. For this and for additional reasons which have been and will be discussed, I credit Morgan's version of the March 28 meetings and her suspension, except that I do not credit Morgan's testimony that she disagreed that she was a supervisor. In sum, although there was probably some discussion of employee grievances and the pros and cons of

unionization, the March 28 meetings centered on Rogers' request and Morgan's expressed reluctance to engage in antiunion activity. General Counsel alleges that the Company, through Rogers, violated Section 8(a)(1) of the Act by creating the impression of surveillance, requesting Morgan to engage in antiunion campaigning, and threatening her with reprisal because she refused to do so, and violated Section 8(a)(1) and (3) of the Act by suspending Morgan. In light of Morgan's supervisory status, I find that Rogers did not act unlawfully by telling her that he knew of her union activity. I find that Rogers asked Morgan to pass out antiunion literature and to campaign against the Union, threatened her with adverse action because of her refusal to do so, and suspended her because she failed and refused to engage in such activity. As to these allegations, the principle of law heretofore stated is also applicable. In sum, an employer may, without violating the Act, request or demand that its supervisory personnel engage in *lawful* antiunion campaigning. However, an employer violates Section 8(a)(1) of the Act by requesting or demanding that its supervisors engage in unlawful activity, and by threatening or disciplining them if they refuse to do so. At this point I shall defer consideration of whether the Company crossed the prohibited line, pending discussion of subsequent developments.

On April 2, the same day the Union filed its initial charge, Morgan, who was still on suspension, telephoned Hunter and said that she would like to return to work. Hunter asked if she were compromising her principles, and she said she did not think so. Hunter scheduled a meeting for the next day. On April 3, Morgan met with Rogers and Hunter in the executive director's office. This time Morgan, without Rogers' knowledge, brought a tape recorder which recorded the meeting until the tape ran out. The tape, together with a transcript (excluding inaudible portions and the last part of the meeting which was not taped), was admitted into evidence. The parties do not dispute the authenticity or accuracy of the transcript, or its admissibility. Rogers testified that the transcript accurately reflected the first portion of the meeting, although he noted that it was uncharacteristic of him to use the expression "drive me to liquor." It is undisputed that the voices of the principal participants are those of Morgan and Rogers, and it is evident from the recorded conversation and transcript that this was the meeting of April 3, and could not have been any other meeting.

I agree with company counsel's reference to the transcript as "a stroke of good fortune for all of us" (Resp. br., p. 10), but not only for the reason advanced by counsel. The transcript significantly aids in the resolution of several important factual questions. I agree with company counsel's argument that the transcript tends to confirm that, at least until after her discharge, Morgan regarded herself as a supervisor under the Act. Morgan testified that Rogers told her that the head nurses were figureheads without real power, but he was going to change that. This remark does not appear in the transcript, although it is plausible that Rogers made such a statement toward the end of the meeting, in view of executive director Livingston's subsequent announcement that head nurses would be made department heads and given additional authority. However, the transcript indicates that notwithstanding ostensible "figurehead" status, Morgan agreed to or acquiesced in the Company's position that she was a supervisor. Thus, the transcript contains the following exchange:[13]

> Man: Under the National Labor Relations Act, you are excluded, you don't have any protection under the Act unless you are asked to commit unfair labor practice.
>
> Woman: You told me it was a law that a supervisor had to support the hospital.
>
> Second Man: That's our policy.
>
> Man: Well, I said that you, uh, supervisors, as far as we were concerned, did have to help the hospital. That is correct . . . .

At no point in the transcript did Morgan express disagreement with Rogers' stated position that she was a supervisor.

As indicated, Morgan consulted with the Union before contacting Hunter on April 2. It is evident that during this period Morgan obtained information concerning her rights under the Act. Morgan is a strong-willed individual, as the Company itself points out (Resp. br., p. 39). It is unlikely that Morgan would have knowingly waived her rights under the Act. Nevertheless (or for that reason) the position taken by Morgan at the April 3 meeting amounted to a declaration of her rights as a supervisor rather than as an employee. Thus Morgan unambiguously stated as follows:

> Woman: I'll do whatever you want me to do while I'm here at the hospital. I'll give out whatever you want me to give out. I'll tell them whatever you want me to tell them, as long as it's legal.

Notwithstanding the foregoing statement, which constituted a straightforward answer to Rogers' requests on March 28, Rogers repeatedly equivocated and avoided a direct response to Morgan's request to know what the Company expected of her. The following excerpt from the transcript is illustrative:

> Woman: Okay, while I'm here, I'll do whatever you all tell me to do, while I'm working. I'll give out whatever you want.
>
> Man: That happens. Can you be supportive of the hospital?
>
> Woman: How do you mean?
>
> Man: Well, then you answer this question. Are the rest of the employees going to be that supportive of the hospital?
>
> Woman: I don't know what you mean supportive of the hospital. I don't know how you mean that.
>
> Man: Uh [inaudible], you, uh, you feel that collective bargaining is a viable concept. Uh, even though, uh, employees at Appalachian Regional earn less money, less benefits, and our employees

[13] In the transcript "Man" refers to Rogers, "Woman" to Morgan, and "2nd man" to Hunter.

were never organized and drew better benefits than these. Would that make a difference to you? You know for sure you're not.

Similarly, when Morgan made the statement of position quoted in the paragraph above, Rogers again avoided an answer by provocatively arguing that she favored collective bargaining at the hospital.

Rogers testified in a vague and equivocal fashion to the effect that, after the tape ran out, Morgan backed away from her previously stated position that she would do anything the Company wanted as long as it was lawful. Rogers testified that Morgan agreed to do anything he wanted "on hospital time or something to that effect." Rogers further testified that "in my opinion" Morgan was unwilling to relinquish her right to attend union meetings. In response to a leading question from Company counsel, Rogers testified that Morgan insisted on her right to attend union meetings on her own time. I do not credit Rogers' testimony. Morgan came to the meeting with sufficient confidence in the validity of her position as to make it a matter of record by tape recording the meeting. In this context, it is unlikely that Morgan would have then proceeded to abandon this position, regardless of whether Morgan knew that the tape had run out (the record evidence fails to indicate whether Morgan was aware of that fact). Moreover, the transcript, and additional evidence which will be discussed, tends to indicate that Morgan expressed the opinion that she could attend union meetings, but was not adamant about the matter. Thus, the transcript indicates the following exchange:

Man: If we bring you back, you are prohibited from going to union meetings.

Woman: No, I can still go to union meetings.

Man: No, You can not. You are not going to go to the union meeting. I'm sorry.

Second Man: It's a violation of the law.

Man: I tell you what I will do. I'll file charges.

Second Man: Yeah. Because then you are jeopardizing management at the hospital because they perceive you as a management person who is spying on them.

Woman: Could I ask you why you're letting Deedra [inaudible]?

Man: It's none of your business. [inaudible] Ms. Ridgeway has come to grips with this whole issue very easily. She's very calm. I am not going to get into it any further than that.

Woman: Okay.

Morgan, by her "okay" indicated that she would acquiesce in the Company's position.

Deedra Ridgeway, referred to in the transcript, was head nurse in the surgical unit. Rogers gave no testimony which would explain the above excerpt, including the inaudible portions. However, Morgan testified that she asked Rogers why another nurse was permitted to take a neutral position and she was not, whereupon Rogers told her that it was none of her business. According to Morgan, Hunter told her that she had to be more assertive because the other employees knew that she supported the Union and looked to her. The context of the foregoing excerpt indicates that in the inaudible portion Morgan questioned why the hospital permitted Ridgeway either (1) to attend union meetings or engage in other union activity, or (2) to remain neutral. The first possibility is an unlikely one, in view of the Company's own expressed policy. Moreover, there is no testimony to support this possibility, nor is there evidence that Ridgeway engaged in any union activity. However, the second possibility is a probable one, and is supported by Morgan's testimony. Indeed, the transcript indicates that Morgan offered to take a neutral position, but Rogers avoided giving an answer. Rather, Rogers indicated that he placed Morgan on suspension until "you feel that you can help the hospital." Whether or not Hunter gave a reason, it is evident that, because of Morgan's open and leading union activity, Rogers felt she could not be useful to the Company unless she demonstrated true repentance by actively opposing unionization. Therefore, and for an additional important reason which will be discussed, I find that at no time did Rogers indicate that he would accept neutrality as a compromise.

Morgan testified that she told Rogers that she filed charges with the Board. However, the transcript indicates that Rogers understood that she contacted the Union and was going to file a charge. On the morning of April 7 the Company was served with a copy of the charge. That same day the Company, by letter signed by Hunter, notified Morgan that she was discharged. Rogers testified that Morgan was discharged because "she was going to end up going to union meetings, and I did not want to have charges filed for that reason," i.e., charges of alleged surveillance by a supervisor. Rogers categorically testified that there were no other considerations. Rogers' testimony is squarely contradicted by the discharge letter, which states that: "Our decision to discharge you is based on your refusal to perform legitimate work requests which are part of your duties as a supervisor." In sum, the letter indicates that Morgan was discharged for refusing to engage in certain affirmative actions, rather than for refusing to refrain from prohibited conduct. As heretofore found, Hunter previously indicated to Morgan that she was expected to engage or participate in certain unlawful activity, and Morgan told Rogers that she would do anything he wanted, so long as it was lawful. However, Rogers conspicuously failed to give an appropriate assurance. Additionally, as will be discussed, subsequent to Morgan's discharge the Company engaged in unfair labor practice conduct which could or would involve the knowledge or participation of its supervisory personnel.

Eurcell Erwin, who was still in the employ of the hospital at the time of this hearing, testified without contradiction that shortly after Morgan's discharge Executive Director Livingston told her and three other night-shift personnel that Morgan was terminated because she brought legal action against the hospital. This brings me to the Company's failure to present either Livingston or Hunter as witnesses in this proceeding. On September 18, 1980, the Company filed with the Regional Director a motion for an earlier hearing date than January 22, 1981,

on the ground "that a high turnover of employees at the Employer's premises may cause certain witnesses for the employer to be unavailable to testify by January, 1981." The motion was unsupported by any affidavit or other factual presentation. The Regional Director denied the motion on the ground that there were no earlier dates available. If the Company were genuinely concerned that material witnesses might be unavailable, then the Company could have requested the Regional Director to direct the taking of depositions to preserve testimony. (See National Labor Relations Board Rules and Regulations, Series 8, as amended, Sec. 102.31; Fed. R. Civ. P. 27(a).) However, the Company took no further action in the matter. No evidence or even assertion was made that the Company attempted but was unable to obtain the presence of Livingston or Hunter at the hearing. Indeed, no evidence was presented that either or both of them had severed their employment relationship with Humana Corporation. Rather, the record indicates only that at the time of the hearing they no longer held their respective positions as executive director and personnel director at the hospital. The Company obtained, for this hearing, the presence of Billie Halstead from Camilla, Georgia, and Cindy Miller and L. J. Rogers from Louisville, Kentucky. Company counsel also came from Louisville, Kentucky. It is evident that the Company has the resources to obtain the presence of any prospective witness who is amenable to subpoena. Although Eurcell Erwin testified that three other night employees were present when Livingston spoke about Morgan, Company counsel did not question her as to their identities. I find that in these circumstances an inference is warranted that, if Livingston and Hunter were presented as witnesses, their testimony would have been unfavorable to the Company's interest. *Martin Luther King, Sr., Nursing Center*, 231 NLRB 15, fn. 1 (1977). Even without such an inference, there is no valid basis for discrediting Erwin's uncontradicted testimony. Although the Company presented testimony that company supervisors were instructed or themselves told employees that they could not discuss the reasons for Morgan's termination, no evidence was presented that the Company gave any reason to the employees other than that given by Livingston. Livingston and Hunter were high ranking officials who were privy to the Company's labor relations policies and the reason or reasons for Morgan's suspension and termination. Therefore their written and oral declarations may be considered as company admissions of unlawful conduct. It is immaterial that Livingston spoke only once to a small group of employees. Whatever his reason, Livingston wanted the hospital employees to know that Morgan was unlawfully discharged, and he knew that if he told only a few employees, word would spread rapidly throughout the hospital. I credit Erwin.

For the foregoing reasons, I find that the Company suspended and discharged Morgan because she refused to engage in unfair labor practice conduct. Therefore the Company violated Section 8(a)(1) of the Act. *Russell Stover Candies, Inc.* v. *N.L.R.B.*, 551 F.2d 204, 206 (8th Cir. 1977), and cases cited therein.[14] As of the April 3 meeting, the Company still held out hopes that Morgan might capitulate to its position. However, the Company accurately interpreted the unfair labor practice charge as a clear message that Morgan would not be coerced into violating the law and, upon receiving the charge, decided to terminate her. Therefore for this additional reason, the Company violated Section 8(a)(1) as well as Section 8(a)(4) of the Act by discharging Morgan. *General Nutrition Center, Inc.*, 221 NLRB 850, 858–859 (1975). The initial charge was not based solely on the erroneous premise that Morgan was an employee within the meaning of the Act. Rather, the charge alleged in essence that Morgan was suspended with intent to discharge because she refused to engage in conduct which itself was unlawful. Therefore the Union's charge, although filed on Morgan's behalf, constituted a step in the process whereby employee rights are vindicated. By discharging Morgan because of the Union's charge, the Company engaged in conduct which tends to interfere with employee rights. Compare *N.L.R.B.* v. *Electro Motive Mfg. Co., Inc.*, 389 F.2d 61 (4th Cir. 1968). Therefore, also, the Company, through Livingston, violated Section 8(a)(1) by telling employees, in substance, that Morgan was discharged because she filed charges with the Board. I further find that the Company, through Rogers on March 28 and April 3, violated Section 8(a)(1) by impliedly requesting and directing Morgan to engage and participate in unfair labor practices, and by threatening her with adverse action, including suspension and discharge, if she failed to do so. However, Rogers did not act unlawfully by threatening to file charges if she attended union meetings, because her attendance at union meetings was not an activity which was protected under the Act. See *Clyde Taylor d/b/a Clyde Taylor Company*, 127 NLRB 103, 108 (1960). Because of Morgan's supervisory status, Rogers also did not act unlawfully by questioning Morgan about her union attitude and activities.

B. *Alleged Violations of Section 8(a)(1) Involving Announcement or Grant of Benefits During the Preelection*

General Counsel alleges in sum that the Company announced or granted certain benefits and improvements in working conditions in order to discourage employee support for the Union. It is undisputed that, during the period between the filing of the election petitions and the election (April 4 to May 22), the Company announced improvements in its sick leave policy, and granted overdue retroactive wage increases to three nurses. General Counsel also presented *prima facie*, albeit disputed, testimony that the Company suspended its PMR staffing

[14] General Counsel has not urged this ground for finding that Morgan was unlawfully suspended and terminated. However, the allegations of the complaint are sufficiently broad to encompass that ground. An administrative law judge is not limited to consideration only of arguments advanced by the parties. Rather the administrative law judge may consider any ground which is encompassed by the pleadings or litigated at the hearing. Here the reasons for Morgan's suspension and discharge, and the related meetings, were fully litigated at the hearing. Moreover, the Company in its brief has argued the question of whether Morgan was asked to engage in unfair labor practices (Resp. br., p. 10).

policy, i.e., refrained from temporarily laying off employees on the basis of the PMR, during the pre-election period. Assuming that the timing of the increases was lawfully motivated, and assuming that the Company did not suspend its PMR policy, the company witnesses who would be in the best position to know these facts are Billie Halstead and Brenda Tuckwiller. (Tuckwiller went on maternity leave on April 11. Halstead then replaced Tuckwiller as director of nursing.) I have previously indicated that Halstead in particular impressed me as a credible witness. Nevertheless, with one significant exception which will be discussed, L. J. Rogers was the only company witness to testify concerning any of the alleged violations of Section 8(a)(1). During his April 2 meeting with Sarah Morgan, Rogers told Morgan:

> . . . I spent 15 months in West Virginia fighting 1199. I've spent two labor campaigns in Eastern Kentucky just sought [sic] of Huntington with 1199. First of all, I am not going to lose this election. . . . I want to get this mess cleaned up, is what I really want to do. . . . And the Steelworkers are a bunch of thugs, let me tell you. . . . I personally don't feel that there is any room in any hospital in this country for a bargaining unit in this sort. That's my position I take. And I don't mean just my hospital. I mean every hospital in this country. . . .

Rogers testified in sum that his main job is to handle employee relations problems for Humana Corporation, that his immediate supervisor, Company Vice President Herbert Phillips, assigned him to the hospital to "investigate some union problems," and that he worked closely with the hospital administration and participated in various hospital personnel policy decisions during that period. It is evident that Rogers' principal, if not only, function during the period from March 28 to May 22 was to defeat the Union, and that he may fairly be characterized as a witness with a strong partisan interest in the outcome of this case.

Humana Corporation, either directly or through its subsidiary firms, operates 197 hospitals throughout the United States. Humana's central region comprises 19 hospitals, including Greenbrier Valley Hospital. Until April 1980, the hospital, like many but not all Humana hospitals, utilized a sick leave policy whereby (1) employees received sick pay beginning with their third day of sick leave, and (2) employees were required to use or lose their accrued paid sick leave beyond the allowed maximum. Within a week after the Union filed its election petition, the Company, through posted announcements and in meetings addressed by Personnel Manager Hunter, informed the hospital employees that they would receive sick pay beginning from the first day of absences and that they would be given the option of converting unused accrued sick leave to cash or vacation time pay.[15]

Rogers testified in sum that he was not involved in the decision to grant improved sick leave benefits, except insofar as he was involved in changing the sick pay plan at the hospital. However, the Company, through Rogers, presented in evidence four memoranda which purported to reflect the decisional process. The first consists of a memorandum from Rogers to Vice President Phillips, dated March 6 (shortly before the union organizational campaign), concerning the cost of the sick leave improvements if implemented on a systemwide basis. Rogers' report contained no recommendation but his tone was distinctly negative. Rogers indicated that the improvements would cost nearly $5 million annually (nearly double the current cost) and that the accounting department was skeptical even of these figures. The second document is a memorandum from Phillips to Humana's regional officials, dated April 21. The memorandum purported to inform these officials that on April 15 Humana's management committee authorized certain improvements in sick pay policy by *June 1, 1980*, and other improvements by *September 1, 1980*. The first category included first-day coverage after 6 months of employment, and the second category included partial conversion privileges. The memorandum stated in pertinent part: "Please note that the dates are final implementation dates only and do not preclude earlier implementation." In response to a leading question from company counsel, Rogers testified that Phillips instructed that "nationally the sick pay plan be put into effect prior to June, 1980." In light of Phillips' memorandum, it is evident either that Rogers' assertion was totally false, or true only in that Phillips gave special instructions which would be applicable to Greenbrier Valley Hospital.

The third memorandum, dated April 23, purports to be from Humana central region Personnel Manager Howard Weliver to central region administrators. The memorandum purports to inform the administrators that first-day coverage would be implemented "effective May 1, and that conversion privileges would be implemented "effective on an employee's anniversary date after September 1." The final memorandum, dated April 29, purports to be from hospital Executive Director Livingston to the employees, informing them that first-day coverage (second day after 3 months of employment) and conversion privileges would be implemented on May 1 and after September 1, respectively, and that these improvements "reflect . . . our company's commitment to expanding and improving benefits." Rogers in his testimony failed to indicate (apart from his discredited assertion discussed above) why first-day coverage was implemented in the central region on May 1, 1 month prior to Phillips' ostensible deadline. Rogers also failed to explain why the hospital, during the preelection period, announced benefits which would not be implemented until after October 1. Also, Rogers failed to contradict or explain the testimony of Doris Hizer that Hunter announced the improved benefits in early April. In light of the foregoing factors, I do not credit Rogers' testimony that the revised sick pay plan would have been effectuat-

[15] According to charge RN Doris Hizer, Hunter said they were working on the plan for 3 years. Former employee (RN) Susan Walker testified that Hunter did not say they had been working on it for a long time. Hizer and Walker did not indicate whether they were present at the same meeting. I find that Hunter probably made this assertion at some but not all of the meetings.

ed at the hospital if there had been no union in the picture.

Preelection announcements of upward revisions in employment terms are presumptively unlawful even if based on determinations made prior to the advent of union activity. However, the presumption is rebuttable. The Board stated:

> Thus, an employer is free to include such references if he can demonstrate either (1) that such announcements were limited to terms already integrated into the existing benefit structure, or (2) at a mininum, that the original determination to grant the prospective benefits was followed up and implemented by a [sequential] chain of events during the period before any union activity so as to dispel notions that the ultimate implementation was accelerated because of union activity, or that union activity prompted a revitalization of a since-abandoned determination to grant such benefits. [*Rexair, Inc.*, 243 NLRB 876, 883 (1979).] *Arrow Elastic Corp.*, 230 NLRB 110, 111-112 (1977), enfd. 573 F.2d 702 (1st Cir. 1978).

Applying these standards to the facts of the present case, I find that the Company has failed to come forward with a credible and lawful explanation for announcing and, with respect to first-day coverage, implementing improved sick pay benefits during the preelection period. Rather, for the reasons discussed above, the evidence indicates that, after the Union commenced its organizational campaign, the Company expedited consideration of sick pay plan improvements, expedited implementation of first-day sick pay, and announced that it would grant additional benefits (the conversion privilege) after October 1, all for the purpose of discouraging employee support for the Union. The Company thereby violated Section 8(a)(1) of the Act.[16]

Doris Hizer began working for the hospital as an LPN. In June 1979 she became an RN, and commenced a 3-month probationary period, which if satisfactorily completed would qualify her as a charge nurse. In September 1979 the hospital approved her promotion from LPN to RN, and gave her an increase in pay from $4.85 to $5.10 per hour. In the meantime, head nurse Alma Lewis prepared an employee performance appraisal on Hizer and discussed the appraisal with her on November 12, 1979. The appraisal, ostensibly prepared on August 22, 1979, indicated that Hizer satisfactorily completed the "appraisal period," and Lewis gave her a "good" overall performance rating of 6.8. Lewis made no express recommendation concerning Hizer's pay or status. However, as the evaluation did not even come close to Hizer's official anniversary date (sometime in January), it is evident that the evaluation related to Hizer's probationary service toward the status of charge nurse. The evaluation was signed by Tuckwiller and approved by the personnel office in November 1979 and also approved by Executive Director Livingston. Nevertheless, Hizer heard nothing further about the matter until April 1980. Hizer testified that after Tuckwiller went on maternity leave (April 11) Halstead summoned her to the nursing office and showed her what was identified in the record as a personnel action request form, approving Hizer's promotion from RN to charge nurse, and authorizing a pay increase from $5.20 to $5.41 per hour, effective September 8, 1979. Halstead told Hizer that she found the form in Tuckwiller's desk drawer, and that Hizer would receive an increase of 21 cents per hour, retroactive to September 1979. The form purported to be approved by Tuckwiller on January 8, by Halstead and Hunter on April 14, and by Livingston on April 16. The Company conceded, and indeed introduced personnel action requests into evidence showing that at the same time Becky Tallman and Linda Legg each received comparable retroactive wage increases. Legg received a 29-cent -per-hour increase, retroactive to September 8, 1979, based on her promotion from RN to charge nurse, and Tallman received a 16-cent-per-hour increase, retroactive to October 2, 1979, based on her promotion or transfer from acting head nurse to charge nurse. Hizer was the employee who initially contacted the Union, and Tallman was one of the employees who was present at the first union meeting at Hizer's home. As heretofore found, the Company received information concerning the meeting.

L. J. Rogers testified that, after Tuckwiller went on maternity leave, her secretary Betty Hoppert discovered the evaluation forms and personnel action requests for the three employees in Tuckwiller's desk. According to Rogers, Hippert gave the forms to Billie Halstead, who turned them over to Rogers, who authorized the increases. Rogers testified that he "may" have discussed the matter with James Hunter, but that he personally made the decision, checking with Halstead only for the purpose of confirming that the employees were entitled to the increases. Rogers testified in sum that the increases would have been granted with or without the Union. Rogers' explanation, which in material part considered of hearsay testimony, was uncorroborated by any other witness. Hippert was not presented as a witness, and Halstead did not testify concerning the matter. Tuckwiller testified that she approved the increase for Hizer on or before January 8, and that she could not recall why the increase was not put into effect. Tuckwiller offered no explanation for the raises given to Tallman and Legg. Moreover, the evidence indicates that the Company followed a practice of dragging its feet on pay raises to which its employees were entitled and that, when the Company got around to approving such increases, it normally did not make the increases retroactive. Thus, although Hizer attained RN status in June 1979, the Company did not approve her promotion and increase based on Rn status until September, and the increase was not made retroactive. LPN Vona Winston testified in sum that, despite her vocal complaints, she encountered a lengthy delay before she received a merit increase to which she was entitled, based on her annual evaluation. I do not believe that Tuckwiller suffered a

[16] I find it unnecessary to determine whether the Company violated Sec. 8(a)(1) by deciding upon or implementing sick pay plan improvements at other hospitals. Indeed, in view of Rogers' self-proclaimed lack of involvement outside Greenbrier Valley Hospital, the evidence presented by the Company in this regard consists of little more than hearsay.

lapse of memory regarding these matters. I also do not believe that Tuckwiller would have simply shoved three promotion requests in her desk and forgotten about them. I find that Livingston and/or Hunter either declined to approve the pay increases or chose to delay action on them. However, after the Union filed its election petition, Rogers went into action, approved the pay increases, and took the extraordinary action of making the increases retroactive. I find that Rogers did so in order to discourage employee support for the Union, and that the Company thereby violated Section 8(a)(1) of the Act.

The third alleged benefit (change in staffing procedure) was marked by a paucity of evidence on both sides. The Company's PMR staffing procedure has previously been described. The Company never announced any change in this procedure. However, Doris Hizer and Eurcell Erwin testified in sum and without contradiction that, during the period from the filing of the election petition until the election, no one was sent home or otherwise asked to take a day off without pay, although such action was taken before April 4 and has been taken since the election. Erwin testified that the census was high during this period, but that it was "up high most of the time." L. J. Rogers testified that the Company did not change its policy, and that the patient census was higher than before. The company witnesses who were in the best position to know the PMR situation during the election campaign, and whether there was any change in policy, namely, Billie Halstead and to a lesser extent Barbara Tuckwiller, did not testify about the matter. No pertinent hospital records were presented in evidence. In the absence of facts showing the contrary, it is unlikely that the PMR during April and May would be significantly higher than during the winter months, with their accompanying illnesses and accidents precipitated by severe weather. It is also unlikely that the hospital would be understaffed during this period, as employees would normally be expected to take their vacations in December or during the summer months. In light of the Company's and in particular Rogers' overall conduct and motives during this period, the fact that employees were not laid off during the election campaign, although they were before and have been since, and the Company's failure to present probative credible evidence which would explain or contradict this apparent change, I find that the Company intentionally refrained from laying off employees pursuant to its PMR policy during the election campaign in order to discourage employee support for the Union, and thereby violated Section 8(a)(1) of the Act.

In sum, I find that the Company announced and granted improved sick pay benefits, granted retroactive wage increases, and refrained from enforcing its PMR staffing policy, all in order to discourage employee support for the Union. In retrospect it is evident that, in his meetings with Sarah Morgan, L. J. Rogers anticipated and impliedly demanded that Morgan excuse, justify, or extol such measures to the employees, and thereby became a participant in the unfair labor practice conduct. Additionally, the Company's temporary cessation of its staffing procedures required the participation of its head nurses. Therefore, the Company's unlawful actions further tend to evidence its unlawful motive in terminating Morgan.

CONCLUSIONS OF LAW

1. The Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. Sarah Morgan was at all times material a supervisor within the meaning of Section 2(3) and (11) of the Act.
4. By requesting and directing Morgan to engage in unfair labor practice conduct; by threatening her with reprisal and suspending and discharging her because she refused to do so, and also discharging her because the Union filed an unfair labor practice charge on her behalf; by telling employees that she was fired because she filed such charges; and by announcing and granting improved benefits and working conditions to its employees in order to discourage employee support for the Union, the Company has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
5. By discharging Sarah Morgan because the Union filed an unfair labor practice charge on her behalf, the Company has violated and is violating Section 8(a)(4) of the Act.
6. The Company has not engaged in any other unfair labor practices alleged in the complaint.
7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Company has committed violations of Section 8(a)(1) and (3) of the Act, I shall recommend that it be required to cease and desist therefrom and from engaging in like or related unlawful conduct, and to take certain affirmative action designed to effectuate the policies of the Act.[17]

Having found that the Company discriminatorily terminated Sarah Morgan, it will be recommended that the Company be ordered to offer her immediate and full reinstatement to her former job or, if it no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any loss of earnings that she may have suffered from the time of her suspension to the date of the Company's offer of reinstatement.[18]

[17] General Counsel requests a broad remedial order (G.C. br., p. 27). I find that in the circumstances of this case, including the substantial question presented concerning Morgan's status, a broad order is not warranted. See *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

[18] In *N.L.R.B.* v. *Brookside Industries, Inc.*, 308 F. 2d 224, 228 (4th Cir. 1962), the court declined to approve reinstatement of a discriminatorily discharged supervisor, because of a preexisting conflict of interest stemming from the fact that her husband worked for the same employer. It is unlikely that, in 1981, a Federal court would deny a conventional Board remedy because of an individual's marital status. In any event, no comparable problem exists in the present case. Morgan was justified in taping her meeting with Rogers because she had reason to believe that she was the victim of unlawful conduct. Her actions did not render her unfit for future employment or otherwise warrant deviation from the usual Board remedy of reinstatement with full backpay. See *N.L.R.B.* v. *Electro Motive Mfg. Co., Inc., supra*, 389 F.2d 61.

Backpay shall be computed in accordance with the formula approved in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[19] It will also be recommended that the Company be required to preserve and make available to the Board, or its agents, on request, payroll and other records to facilitate the computation of backpay due.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[20]

The Respondent, Humana of West Virginia, Inc. d/b/a Greenbrier Valley Hospital, Ronceverte, West Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Requesting or instructing any of its personnel, including supervisors, to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7 of the Act.

(b) Threatening, disciplining, suspending, or discharging any of its personnel, including supervisors, because they fail or refuse to agree to engage or participate in such unlawful conduct.

(c) Discharging or otherwise discriminating against any of its personnel, including supervisors, because they file unfair labor practice charges or because such charges are filed on their behalf.

(d) Telling employees that any of its personnel, including supervisors, have been discharged because they filed charges under the Act.

(e) Announcing or granting wage increases or other benefits or improved working conditions in order to discourage support for the Union, or any other labor organization.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action which is found necessary to effectuate the policies of the Act:

(a) Offer Sarah Morgan immediate and full reinstatement to her former job or, if such job no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights previously enjoyed, and make her whole for losses she suffered by reason of the discrimination against her as set forth in the section of this Decision entitled "The Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(c) Post at Greenbrier Valley Hospital copies of the attached notice marked "Appendix."[21] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[19] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716, 717–721 (1962).

[20] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[21] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."